United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 31, 2000

TO : Richard L. Ahearn, Regional Director

Region 9

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

524-1717-1900 SUBJECT: TCA, INCORPORATED 524-1783-0000

Case 9-CA-37559 524-6708-0000

524-6740-5000 524-5073-1170 524-6793-5000 737-8433-3350

This case was submitted for advice as to whether the Employer violated Section 8(a)(3) when it discharged an employee for telling another employee that "he had heard that, if the union was voted in and cards were passed out and you did not sign one, you would be fired."

FACTS

The Employer employs approximately 400 employees that are not represented. The Union began an effort to organize the employees around January 7, 1999. Between January 7 and March 14, the organizers held several meetings. The largest attendance at any single meeting was 18 employees.

During this time, Robert Samuel Moore was active as a union supporter. He signed a union card, attended meetings, and solicited the opinion of co-workers regarding how they felt about the Union.

On March 21, the Employer held two captive audience meetings with more than 100 employees attending each meeting. During the meetings, the Employer threatened to close its plant if the employees voted the Union in. The Employer also told of other plant closings in the area that were due to union activities.

On March 29, after the plant closure threats, Moore asked co-worker Draper about his opinion regarding the Union. Draper responded that if cards were passed out, "he would hand back a blank one." Moore responded that he "had heard that if the Union was voted in and cards were passed out and you did not sign one, you would be fired."

¹ All dates are 1999 unless otherwise indicated.

Later that same day, the Plant Manager called Moore to his office and asked if he made the statement to Draper. Moore admitted he made the statement. The Plant Manager told Moore the Company would not tolerate employees threatening and harassing other employees over the union. Moore then apologized and stated that he had not realized his actions were threatening. The Plant Manager suspended Moore for three days. He informed Moore that there would be an investigation, and that he should call in by 2:00 on March 31 to see if he would be allowed to return to work. Moore was then escorted out of the plant.

On March 31, the Plant Manager told Moore that he was being discharged. He explained that he could get in trouble with the law if Moore was not discharged for making the threat. The same day, the Employer met with groups of employees and told them that an employee had been fired for threatening another employee to join the Union and that such conduct would not be tolerated.

ACTION

We conclude that a Section 8(a)(3) complaint should issue, absent settlement, alleging that the Employer unlawfully discharged Moore for engaging in protected activity.

There is no question that Moore was engaged in protected activity when he initiated a discussion with Draper regarding the merits of unionization. The Employer discharged Moore for that activity. Therefore, unless Moore's statement - that employees who did not sign a card "would be fired" - was an unprotected threat, the Employer's action violated Section 8(a)(3).

In <u>Continental Woven</u>, ² the Board held that a statement by one employee to another employee, to the effect that the employee would lose his job if he did not sign an authorization card, was conduct outside the protection of the Act. That type of statement has been considered by the Board to be a threat of discharge for exercising the right not to support a union.

However, the statement in the instant case is distinguishable from that in <u>Continental Woven</u>. First, the statement here was made during a casual conversation about potential unionization, and did not involve solicitation of

² 160 NLRB 1430 (1966).

an authorization card. Second, the statement here was not a direct threat, as in <u>Continental Woven</u>, but merely the providing of information about what Moore "had heard" would happen if the Union was voted in. Finally, and perhaps most significantly, the statement here referred to job loss for failure to sign cards passed out <u>after</u> the union was voted in, and clearly was not a threat of job loss for failure to support the Union in the campaign or election. Moore obviously was referring to the need to become a union member, or a service fee payer, if the Union won the election and a union security clause was negotiated, and Draper reasonably should have understood the statement in that way.

It is the Employer's burden to show that the statement was a threat that would deprive Moore of the Act's protections. 5 The Employer has not met that burden, especially in view of the Board's recognition of the strident language that must be permitted in the organizing context. 6

Furthermore, even if the statement was unprotected under <u>Continental Woven</u>, we conclude that the Employer's stated reason for the discharge was pretextual, and that

³ See <u>Liberty House Nursing Home</u>, 245 NLRB 1194, 1202 (1979) (in the absence of a direct threat that employee would lose her job if she failed to sign an authorization card, conversation in which employee Martin "postulated that if [employee] Wade failed to join the union, Martin could go over her head and have Wade fired . . ." was an inconsequential and trivial form of misconduct).

⁴ See <u>S. E. Nichols of Ohio, Inc.</u>, 195 NLRB 939, 942 (1972) ("the utterance of 'I'll get you' was so highly ambiguous in nature that it did not amount to a threat justifying discharge"); <u>Classe Ribbon Company</u>, 227 NLRB 406, 408 (1976) (statement about rumor was merely informative and not threatening).

⁵ N.L.R.B v. Burnup & Sims, 379 U.S. 21 (1964).

⁶ Liberty House Nursing Home, 245 NLRB at 1203 (during a union campaign, passionate dialogue between prounion and antiunion employees is inevitable, and an employer must exercise prudent judgement in responding to untoward statements in that context), citing NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir.) ("[t]he employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect").

Moore was actually discharged for his union activities. The General Counsel can make out a prima facie case of an unlawfully motivated discharge, based on the Employer's animus and knowledge of Moore's organizing activities. Although the Employer presents a Wright Line defense, it has not demonstrated that it would have discharged Moore for this relatively minor "threat" absent its anti-union concerns. 7

Indeed, the Employer's action is highly suspect in view of the fact that this was such a minor infraction. 8 There is no indication that Moore was a problem employee, and he had an above average work record. He was cooperative during the questioning about his statement, admitted he had made the statement, and apologized for his actions. He had received no prior warning that this type of statement violated the Employer's rules and could lead to termination. In addition, the Employer had made far more serious threats of plant closure should the employees support the Union. We further note that the Employer assembled the employees immediately after discharging Moore and warned them that they could be subject to discharge for similar conduct. Thus, considering the totality of the circumstances, 9 we conclude that, even were the Board to consider Moore's statement to be an unprotected threat, the Employer seized upon the statement as a pretext to discharge him for his union activities. 10

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) of the Act by unlawfully discharging Moore.

⁷ See <u>Peter Vitalie Company</u>, <u>Inc.</u>, 310 NLRB 865 (1993) (employer cannot simply present a legitimate reason but must demonstrate that it would have taken the action even absent its union animus).

⁸ See <u>Liberty House Nursing Home</u>, 245 NLRB at 1203 (employers may not use discipline so drastically in excess of rational management as to deprive the employees of statutory organizational rights).

⁹ See <u>Barrus Construction Company</u>, 193 NLRB 410 (1971) (trier of fact may infer from the totality of the circumstances that an unlawful motive exists).

^{10 &}lt;u>S. E. Nichols of Ohio, Inc.</u>, 195 NLRB at 942 (pretext found where employer's punishment was drastic vis-à-vis the employee's threat).

B.J.K.